

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Knoxville April 29, 2009

STATE OF TENNESSEE v. SCOTT EUGENE LINLEY

Appeal from the Circuit Court for Marshall County
No. 08-CR-52 Robert Crigler, Judge

No. M2008-01985-CCA-R3-CD - Filed October 28, 2009

The Defendant, Scott Eugene Linley, pled guilty to sale and delivery of 0.5 grams or more of cocaine, both Class B felonies, with the length and manner of sentences left to the discretion of the trial court, which merged the two counts. After a sentencing hearing, the trial court denied the Defendant's request for alternative sentencing and sentenced him to eight years in the Department of Correction. The Defendant appeals, arguing that the trial court erred by denying him alternative sentencing, particularly community corrections. After reviewing the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Donna Orr Hargrove, District Public Defender; and Andrew Jackson Dearing, III, Assistant District Public Defender, for the appellant, Scott Eugene Linley.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Charles F. Crawford, Jr., District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the Defendant's plea acceptance hearing, the State indicated that this case resulted from a December 2007 incident in which the Defendant sold 1.0 gram of powder cocaine to a confidential informant. The Defendant did not dispute the factual recitation during the plea acceptance hearing, but when interviewed for the presentence report the Defendant stated, "I made nothing so I wasn't [selling] drugs." During the sentencing hearing the Defendant testified that his usual practice was to obtain drugs from a particular dealer and then transfer the drugs from this dealer to the buyer. Either the buyer or the dealer would compensate the Defendant by giving him drugs. In this

particular case, the Defendant stated in the presentence report that he initially contacted his dealer in an attempt to provide drugs to the confidential informant, who requested the drugs. The dealer did not answer the Defendant's initial call, but when the informant later told the Defendant that the dealer had contacted him and said that the drugs were available, the Defendant went to his dealer and obtained the cocaine for the confidential informant.

At the sentencing hearing, the forty-two-year-old defendant testified that he had undergone five different spinal fusions and suffered constant pain in his back, hips, and neck. He said that he walked with a limp resulting from a knee surgery and also took four "breathing treatments" per day, involving his being administered albuterol and ipratropium bromide from a machine for twenty to twenty-five minutes. The Defendant said that he had two ruptured discs in his lower back that required surgery; the Defendant admitted that he had been scheduled for back surgery in 2005 but that the surgeon refused to operate because the Defendant had cocaine in his system at the time scheduled for the operation. The Defendant said that he had some titanium rods, two plates, and "quite a few screws" in his lower back, as well as a "cage" around his neck and a plate on each side of his neck.

The Defendant said that he had twice broken his neck as the result of a trampoline accident: once when he was twelve years old and once in his thirties. The Defendant said that in 1987, when he was twenty-two years old, he was in a car accident in which he suffered a "crushed" arm and a broken jaw. That accident required him to be hospitalized for a month and spend time in rehabilitation relearning to walk and talk.

The Defendant acknowledged that he self-medicated to remedy his pain. He testified that he had been addicted to cocaine for nearly twenty years, although he claimed that he had not used cocaine since March 3 or 4, 2008, some five months before the sentencing hearing. He also said he regularly used marijuana, most recently two weeks before the sentencing hearing. The Defendant insisted that if he were sentenced to probation or community corrections, he would abide by any conditions, including drug treatment or testing. He acknowledged that in the presentence report, he said that he would be unable "to survive in prison."

On cross-examination, the Defendant said that when he last smoked marijuana, some person came by his apartment with marijuana, and they smoked it together. The Defendant claimed not to remember the identity of the person with whom he shared the marijuana, attributing his inability to remember the person's identity to a brain injury. He also said that he did not remember the names of other people from whom he received marijuana during 2008. He also acknowledged that despite his breathing difficulties, he regularly smoked cigarettes.

The Defendant testified that while playing volleyball, he fell and hurt his arm and hip. He said that after suffering these injuries, "[m]y back was hurting real bad and my lungs were hurting, and I couldn't breathe real well," which led to his being placed on breathing treatments. The Defendant testified that he suffered these injuries while in a rehabilitation facility, which "wouldn't prescribe me pain medication." The facility's refusal to prescribe him medication prompted the

Defendant to leave the facility and seek care from his own doctor. The Defendant denied that he asked the facility to provide him with morphine.

The Defendant said that he had been a drug dealer for “[m]aybe” a year, during which time he conducted no more than ten transactions. He testified that although he stated in the presentence report that he had a \$200 to \$300 per day cocaine habit, this figure was exaggerated, although he could not recall exactly how much cocaine he used per day. He also refuted his statement in the presentence report that he had not worked in ten years; he said that he had worked for a total of fifteen years and that he had been on disability for five to seven years.

Terese Frazier with the Board of Probation and Parole testified regarding the presentence report which she prepared and which was introduced into evidence at the sentencing hearing. The presentence report indicates that the Defendant had seven prior misdemeanor convictions: convictions in 1993 for simple possession and driving on a suspended license; public intoxication convictions in 2004 and 2005; two convictions in 2006 for disorderly conduct; and a theft conviction in 2006.

The presentence report indicates that the Defendant suffered from “degenerative disc disease with radiculopathy.” The Defendant underwent back surgery in 2003 and was scheduled for additional surgery in 2005, but this surgery did not occur because the Defendant tested positive for cocaine on the scheduled surgery date.

Regarding the Defendant’s drug use, Ms. Frazier testified that the Defendant told her that he first used marijuana when he was sixteen years old and that he used the drug once per week. The presentence report indicates that the Defendant began using cocaine following his car accident and that he was twenty-two or twenty-three years old when he began using the drug. In the presentence report, the Defendant stated that the accident “caused me to lose a large part of my life. [The] brain injury changed who I was. It changed my thinking, speech[,] and realization of things. I became violent with my wife both verbally and physically.” The Defendant began using crack cocaine in his “late twenties” because he “couldn’t do powder anymore. I didn’t want to shoot up.” The Defendant told Ms. Frazier that “most of the time” he smoked crack cocaine daily, although he had not done so since March 4, 2008, and that he used between \$200 and \$300 worth of cocaine per day.

Ms. Frazier testified that the Defendant had enrolled in three different drug treatment programs but did not complete any of them. According to the presentence report, he first enrolled in Buffalo Valley in 2004, but he left after approximately twenty days because he “‘felt like . . . he was being talked down to like a dog.’” The Defendant reported staying clean for a year before entering the Lincoln Trails program in Kentucky. The Defendant claimed he left the facility after nineteen days against medical advice. The Lincoln Trails medical records department told Ms. Frazier that the Defendant left against medical advice but that he was enrolled at the facility between March 9 and March 14, 2004, presumably less than a year after leaving Buffalo Valley. In 2008, the Defendant enrolled in a program through Skyline Medical Center; he stayed there between March 4 and March 13, 2008, before Skyline referred him back to Lincoln Trails. The Defendant stayed

at Lincoln Trails between March 13 and March 21, 2008, before leaving. In the presentence report, the Defendant stated that he left Lincoln Trails the second time because he injured his wrist playing volleyball and the facility would not give him medication. He also claimed that he “knew [the] police [were] looking for him and [he] came home to face the police.” Although not stated in the presentence report, Ms. Frazier testified that she spoke with a Lincoln Trails medical records staff member who said that the Defendant’s records did not indicate that the Defendant had been injured playing volleyball. The staff member told Ms. Frazier that the records did show that the Defendant “specifically asked for morphine,” which the staff did not give him.

The presentence report indicates that the Defendant had a daughter who was sixteen years old as of the sentencing hearing; Ms. Frazier testified that the girl received social security benefits. The Defendant received \$849.60 Social Security Disability (SSD) benefits per month and paid \$144.00 per month for rent in subsidized housing. On cross-examination, Ms. Frazier acknowledged that the Defendant provided documentation from the Social Security Administration confirming that he was eligible for SSD payments and detailing the amount of assistance he received.

At the close of the sentencing hearing, the trial court denied the Defendant’s request for alternative sentencing and sentenced the Defendant to an eight-year term in the Department of Correction as a Range I, standard offender. The trial court said that it would recommend special needs treatment for the Defendant, adding, “I don’t take any pleasure in doing that, because it is just something I have to - - because of your medical condition. They can treat you at special needs. Insurance isn’t going to matter there. The county can’t afford that.” The Defendant subsequently filed a timely notice of appeal.

ANALYSIS

An appellate court’s review of sentencing is de novo on the record with a presumption that the trial court’s determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the appellate court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his behalf, (7) the potential for rehabilitation or treatment, and (8) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991); State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

Alternative Sentencing

In determining whether incarceration or an alternative sentence is more appropriate, a trial court should consider whether (1) confinement is needed to protect society by restraining a defendant with a long history of criminal conduct, (2) confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) less restrictive measures have frequently or recently been applied unsuccessfully to the defendant. Ashby, 823 S.W.2d at 169 (citing Tenn. Code Ann. § 40-35-103(1)(A)-(C)). The trial court shall also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. Tenn. Code Ann. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). The trial court should also consider a defendant's potential or a lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code Ann. § 40-35-103(5); Boston, 938 S.W.2d at 438. Ultimately, the trial court should impose a sentence that is "no greater than that deserved for the offense committed" and is "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(2), (4).

On appeal, the Defendant argues that he should have been sentenced to either full probation or community corrections. Initially, we note that as the Defendant was convicted of a Class B felony, he was not entitled to be considered a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In its brief, the State argues that the Defendant "is not eligible for probation as an offender convicted of violating Tenn. Code Ann. § 39-17-417(b)." Section 39-17-417(a) criminalizes the sale, delivery, or manufacture of a controlled substance; subsection (b) renders a violation of subsection (a) a Class B felony if the controlled substance is a Schedule I narcotic. Cocaine is a Schedule II narcotic; thus, the statutory language making offenders who are convicted of offenses involving a Schedule I narcotic ineligible for probation does not apply here. A defendant convicted of an offense involving twenty-six grams or more of cocaine would also be ineligible for probation, see id. §§ 40-35-303(a), 39-17-417(i)(5), but as the Defendant was convicted of delivering only 1.0 gram of cocaine, that provision is also inapplicable to him. Thus, contrary to the State's assertion, the Defendant was eligible for probation in this case.

Furthermore, the Defendant was statutorily eligible for probation in that his actual sentence was less than ten years and his offense was not among those which would have made him ineligible for probation. See id. § 40-35-303(a). However, a defendant has the burden of establishing his suitability for full probation. See State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). No criminal defendant is automatically entitled to probation as a matter of law. State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would "subserve the ends of justice and the best interest of both the public and the defendant." State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002) (citations omitted). In determining whether to grant probation, the court must consider the nature and circumstances of the offense, the defendant's criminal record, the defendant's background and social history, his or her mental and physical condition, the deterrent effect on the defendant, and the defendant's potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-103.

Similarly, the defendant was statutorily eligible to be sentenced to community corrections. See Tenn. Code Ann. §§ 40-36-103(1), -106(a) and (c). “That a defendant meets the minimum requirements of the Community Corrections Act of 1985, however, does not mean that he is entitled to be sentenced under the Act as a matter of law or right.” State v. Ball, 973 S.W.2d 288, 294 (Tenn. Crim. App. 1998) (citing State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987)).

The Defendant argues that he was well-suited for an alternative sentence because “[t]he crimes he committed were not of a violent nature and he committed these crimes because of his addiction and lack of job skills. He is in need of job training and in need of help with his addiction.” He also argues that the trial court improperly denied alternative sentencing based on the “deterrent effect” and the “avoid depreciating the seriousness of the offense” factors. The Defendant’s history of serious injuries weighs in favor of granting an alternative sentence. We also agree that the trial court’s reliance upon the “avoid depreciating the seriousness of the offense” factor was improper because these offenses were not “especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive an exaggerated degree,” and the circumstances of this offense do not outweigh all factors favoring probation. See State v. Fields, 40 S.W.3d 435, 441 (Tenn. 2001) (citations omitted). However, the record does not indicate that the trial court cited deterrence as a basis upon which it denied alternative sentencing.

Despite the factors weighing in the Defendant’s favor, we conclude that the trial court did not err in denying alternative sentencing. In this case, the record reflects that the Defendant has a lengthy criminal history; although his seven prior convictions were for misdemeanor offenses, at the sentencing hearing he admitted to a history of illegal drug use and serving as a drug dealer. Furthermore, the proof showed the Defendant’s potential for rehabilitation to be low, given his three failed attempts at inpatient drug treatment programs and his testimony that he did not remember the person with whom he smoked marijuana shortly before the sentencing hearing, which the trial court found to be not credible. See State v. Nunley, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999). This proof supports the trial court’s imposition of a sentence of incarceration; accordingly, we deny the Defendant relief.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE.